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IN THE

# Supreme Court of the United States

**October Term, 1960**

DOCKET No. 111

BURTON N. PUGACH,

*Petitioner,*

—against—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

*Respondents.*

## MOTION FOR LEAVE TO FILE and BRIEF FOR THE NEW YORK CIVIL LIBERTIES UNION and the AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE*

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CASE PRESS INC., 82 Beekman St., N. Y. — BEekman 3-2005

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## MOTION FOR LEAVE TO FILE and BRIEF FOR THE NEW YORK CIVIL LIBERTIES UNION and the AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE*

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### Motion for Leave to File

EMANUEL REDFIELD certifies that he is counsel for the New York Civil Liberties Union and has been requested by the American Civil Liberties Union, its national body to apply on its behalf for leave to jointly file a brief as *amici curiae*, urging the reversal of the judgment of the Court of Appeals.

When this case was before the Court of Appeals, that Court upon oral application granted the application of the New York Civil Liberties Union to file a brief. A brief

was thereafter filed and is so noted in the published opinion of the court. 277 Fed. 2d 739 at 740.

These organizations for a long time have been interested in advancing the effective enforcement of the federal laws against the interception of telephonic communications. Long before the *Benanti* decision of this court they had contended that the federal law on the subject as the supreme law of the land prevailed over any state law that permitted such practices. An example of such contention is found in *Black* v. *Impelliterri*, 201 Misc. 371; 305 N. Y. 724.

It is therefore requested that leave be granted to said organizations to jointly file a brief as *amici curiae*.

Respectfully submitted,

.....

Emanuel Redfield

## Statement of Interest

The Civil Liberties Union for a long time has fought against the evil of wiretapping. It has recognized along with the Congress of the United States that it is an invasion of the privacy of persons, and that it is an evil for such an invasion to exist. It has contended that the New York statute and Constitutional provision that permits wiretapping is a violation of and in conflict with the paramount power of Congress in that field.

Recently this Court confirmed that position in *United States* v. *Benanti*, 355 U. S. 96. Although the Court declared the New York law conflicts with paramount federal law, nevertheless wiretapping persists in the State. Undoubtedly, those who engage in violating the federal statute do so because the *Defore* rule in New York (*People* v. *Defore*, 242 N. Y. 13), as recently reaffirmed with respect to wiretapping in *People* v. *Variano*, 5 N. Y. 2d 391, encourages the violation of law by law enforcement officers, for the courts in New York will not pause to inquire into the manner evidence was obtained.

The search has therefore turned toward discovering a remedy that will enforce compliance with federal law. None has effectively succeeded. *Hoffman* v. *O'Brien*, 88 F. Supp. 490; *Black* v. *Impelliteri*, 201 Misc. 371; affd. 281 A. D. 671; appeal dismissed, 305 N. Y. 724 (a taxpayer's action against municipal officials to enjoin the use of public funds for wiretap equipment and personnel); *People* v. *Variano*, *supra*, an attempt to exclude such evidence in a criminal trial, which if successful would have been some means of discouraging wiretapping.

The instant case is cast with that background. The paramount federal law is openly flouted under the dubious authority of State law, yet no effective remedy exists. It is worth no more than mention that the federal provision for prosecution of violators and actions for damages are illusory.

Therefore, the present action presents a feasible solution for at least preventing the use of the evidence in a trial against the person whose privacy had been illegally invaded. Although it will not completely halt unlawful wiretapping, it will serve to discourage its rampant use.

## Violation of the Federal Law Is Clear and Undisputed

This case brings into sharp focus the conflict presented by the open violation of federal law by state officials. Section 605 of the Federal Communications Act forbids the interception and divulging of telephonic communications. The *Benanti* case clearly declares that the proscription of the Federal law applies to state officials. Yet, the New York Constitution Art. 1, Sect. 12 authorizes wiretaps and Section 813-a of the New York Code of Criminal Procedure implements such practice.

Thus, the conflict by express law is manifest.

Nor has the New York statute been merely an idle statement of policy. That the practice of interceptions by New York officers is rampant has been noted in the Court of Appeals, 277 Fed. 2d 739, 748 note 4. The compilation of the figures of the wiretaps should serve as a reminder that each tap is a violation of federal law.

And upon the argument in this case in the Court of Appeals the District Attorney unabashedly asserted (as if to confirm the accepted practice), that the wiretaps in this case will be used in the prosecution of the petitioner (at page 746).

## The Petitioner Has No Remedy Other Than By An Injunction In This Action

Since the respondents have conceded the existence of the taps and the intention to use them at the trial, no remedy against their use remains to petitioner, unless the respondents are restrained.

State law, *People* v. *Defore*, 242 N. Y. 13, whose doctrine was recently affirmed by that Court in *People* v. *Variano*, 5 N. Y. 2d 391; *People* v. *Exum*, 7 N. Y. (2) 766, will not bar the admissibility of such evidence at the trial in state courts, contrary to the optimism expressed by Judge Waterman, below. And as long as *Schwartz* v. *Texas*, 344 U. S. 199 abides as the doctrine of this Court (may the instant case be an additional inspiration for its demise!), the petitioner will not be able to challenge the unlawful acts of the respondents' agents in the federal courts.

Thus, the petitioner is without a remedy. And attempts to find other remedies against the repeated violation of Section 605 have not succeeded. *Hoffman* v. *O'Brien*, 88 F. Supp. 490; *Black* v. *Impelliterri*, 201 Misc. 371; affd. 281 A. D. 671; appeal dismissed 305 N. Y. 724; *People* v. *Variano*, 5 N. Y. 2d 391.

## A Federal Court Should Exercise Its Power to Grant the Injunction

There is no question about the equitable *power* of the federal courts to act with respect to the subject matter. The question is the exercise of discretion to act. Numerous are instances in which the federal courts have exercised equitable jurisdiction against state officers to sustain federal rights. Some of those cases are: *Sterling* v. *Constantin*, 287 U. S. 378; *Hague* v. *CIO*, 307 U. S. 496; *Ex parte Young*, 209 U. S. 123, 155; *Brown* v. *Board of Education*, 347 U. S. 483; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 292, 293; *Truax* v. *Raich*, 239 U. S. 33, 37; *Cavanaugh* v. *Looney*, 248 U. S. 453, 456; *Terrace* v. *Thompson*, 263 U. S. 197, 214; *Dreyer* v. *Illinois*, 187 U. S. 71.

Should a federal court prevent the introduction at the State criminal trial of wiretap evidence? This is the sole question to be resolved by this Court. In this case, upon the application for a stay, Judge Medina held for the Court of Appeals that power to grant an injunction existed to prevent divulgence of wiretap evidence expected to be introduced at a State trial, and that such power should be exercised. See also, *Rea* v. *United States*, 350 U. S. 214, where a federal officer was enjoined from using wiretap evidence in a State prosecution; also *Reitmaster* v. *Reitmaster*, 162 Fed. (2) 691 (2nd C. C. A.). In *Burack* v. *Liquor Authority of New York*, 160 Fed. Supp. 161, the District Court assumed jurisdiction to grant an injunction against the use of wiretap evidence before an administrative board.

The only argument that might be urged against the exercise of equity power by a federal court is that the federal

system requires a certain indefinable restraint by federal courts to prevent the use of the illegally gained evidence from being used in a state court, though it has no such qualms in a prosecution in a federal court (*Stefanelli* v. *Minard*, 342 U. S. 117). But is this the answer? Must the federal courts back away from enforcing its own laws because in a trial at which illegal wiretaps will be introduced a state is involved. Suppose the federal government had prosecuted a state official for violating the federal law against wiretapping in this case, wouldn't this be a disrespect of "the proper balance between the states and the federal government in law enforcement"? Indeed, such prosecution at this very stage, at this very date, would be as much intrusion by the federal government as would be an injunction. Yet no one would argue that such prosecution could not lie. *Ex parte Royall*, 117 U. S. 241, 251; *Boske* v. *Comingore*, 177 U. S. 459.

But the answer given is that it would not be "orderly" for an injunction to issue to prevent evidence from being used. This is not an adequate solution however for enforcement of federal law. Suppose the victim of the intrusion learned about the intercepted messages long before a prosecution of him was contemplated. *What interference would there be with an orderly trial in the State court if no trial had yet started?* Should the federal government be prevented, therefore, at any stage from vindicating its law?

The adherence to "order" at the cost of sacrificing the dignity of federal law and federal supremacy is a fetish, that cannot be supported. "Order" is not an end in itself. The intellectual mind has a tendency to fall into that groove. The intellectual feels cozy when all is orderly. His goal is

to arrange facts into orderly generalities and to gain symmetry. But order, while desirable, is elusive. The pressures of events, the pressures of facts come along to frustrate it. Events are more stubborn than formal arrangements. Formalities, fictions at best, must give way to justice and to its proper administration. Here we have the articulate need for a remedy. Must that necessity yield for the sake of the harmony found in order?

The petitioner might have been successful in restraining the state officers in the state criminal court or at Special Term (see, *People* v. *Roth*, 207 Misc. 875; *Matter of Silfa* v. *Kennedy*, 5 Misc. (2) 375; 3 App. Div. (2d) 818; 3 N. Y. (2d) 374) in which cases, state judges acted before trial was commenced to prevent the use of evidence unlawfully seized. Those cases illustrate the fallacy that a "piecemeal" trial will result. Piecemeal activities at criminal trials take many forms, such as demurrers, motions to inspect grand jury minutes, motions for a bill of particulars, habeas corpus, etc. These are interferences with a speedy trial and are no different in principle from an application for an injunction or stay.

If such interferences with an orderly trial by state courts are acceptable, how are they less interferences when performed by federal judges sitting just across the street from the state court building? The federal judge at least, stands on firmer ground. He is seeking to enforce federal law,—paramount law; and enforcement of paramount law should take precedence over all other factors. Failure to do so, not because of lack of power, but squeamishness to exercise it, can result in only a lack of respect for the enforcement of the law.

"Interference" with the state prosecution in this case by a federal court is comparable to the minimal interference that occurs every time a challenge is made in a federal court under *Weeks* v. *United States*, 232 U. S. 383 to exclude illegally obtained evidence. Such challenges are of frequent occurrence that Rules have been established to govern them. Federal Rules of Criminal Procedure, Rule 41-e.

The diffidence a federal judge may feel toward intrusion into a state prosecution should not be dispositive of the greater issue of the supremacy of federal law. Jurisdiction to vindicate federal law resides in a federal court, and such power has claims superior to diffidence. Resentment against federal intrusion has no support in reason. Its source may be found in artificial emotional appeals. The judge who sits in a federal court is no less a human being endowed with power than the judge sitting in a state court. And often, the concatenation of events determines whether he is appointed to a federal post rather than to that of a state. Therefore, the exercise of power by a federal judge, is not to be fettered any more than is the power of a state judge to act at any pretrial stage of a prosecution,—and as was demonstrated above, state judges have acted at such stages and have not deemed their exercise of power an interference with impending prosecutions.

If the argument against interference with state trials is removed, reluctance to exercise equity power should be dissipated, for the numerous cases cited, support such power in the federal courts against state officers. And since the exercise of such power is discretionary, the im-

passe created by the dilemma in this case, should weigh heavily in favor of its exercise. A federal court should not be reluctant to vindicate the supremacy of federal law.

Respectfully submitted.

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